Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Case No.: 77-1432

JOSEPH EDWARD KILRAIN, a/k/a DUFFY, JO ANN DAVIS, RICHARD OTHO PIPER, JACK KILRAIN, a/k/a JACK HICKEY AND JOHN HICKEY,

Petitioners,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Case No.:

JOSEPH EDWARD KILRAIN, a/k/a DUFFY,
JO ANN DAVIS, RICHARD OTHO PIPER,
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JOHN HICKEY,

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-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Joseph Edward Kilrain, Jo Ann Davis, Richard Otho Piper and Jack Kilrain, seek to have this Court issue its Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, to review the decision of that court affirming the conviction of Petitioners which occurred before the United States District Court for the Northern District of Georgia.

OPINION BELOW

The decision of the Court of Appeals is reported in *United States v. Kilrain, et al.*, 566 F. 2d 979 (5th Cir. 1978) and is contained in the Appendix to this Petition at A 1-12.A

timely petition for rehearing was denied on 24 February 1978. a copy appears in the Appendix at A-13. A stay of mandate has been ordered by the appeals court for and during these certiorari proceedings. a copy of the stay is attached and appears in the Appendix at A - 14.

JURISDICTION

The judgment of the United States Court of Appeals. Fifth Circuit. was entered on 30 January 1978. Timely Petition for Rehearing was denied on 24 February 1978. The jurisdiction of this Court to review the decision of the Court of Appeals is invoked pursuant to Title 28 USC § 1254 (1).

QUESTIONS PRESENTED

1. MAY THE GOVERNMENT WILLFULLY AND INTENTIONALLY FAIL AND REFUSE TO COMPLY WITH A TIMELY AND LAWFUL ORDER OF THE TRIAL COURT WHICH REQUIRES THE GOVERNMENT TO PROVIDE. THROUGH A BILL OF PARTICULARS. *ALL* OF THE OVERT ACTS IT INTENDS TO INTRODUCE AT THE TRIAL OF THE CHARGED CONSPIRACY. CONSISTENT WITH "DUE PROCESS" REQUIREMENTS VOUCHSAFED TO THE DEFENDANTS THROUGH THE CONSTITUTION?

2. AFTER HAVING WILLFULLY FAILED TO COMPLY WITH AN ORDER OF THE COURT TO FURNISH *ALL* THE OVERT ACTS THE GOVERNMENT INTENDS TO RELY UPON IN THE PROSECUTION OF A CONSPIRACY CHARGE. MAY THE GOVERNMENT INTRODUCE THERETOFORE UNREVEALED "OVERT ACTS" WHICH ANTEDATE THE CHARGED CONSPIRACY AND ESTABLISH. IF ANYTHING. THE EXISTENCE OF OTHER CONSPIRACIES HAVING AS THEIR ONLY NEXUS THE FACT THAT ONE OR PERHAPS TWO OF THE DEFENDANTS ARE COMMON TO EACH CONSPIRACY. WITHOUT COMMITTING REVERSIBLE ERROR?

3. WHERE ONE DEFENDANT. AFTER ARRAIGNMENT AND WITH THE FULL KNOWLEDGE OF THE PROSECUTOR. BECAME A PAID-INFORMANT FOR THE DEA AND SHORTLY THEREAFTER NOT ONLY LURED ANOTHER OF HIS UNSUSPECTING CO-DEFENDANTS INTO A MEETING WITH DEA AGENTS (ACTING UNDERCOVER) DURING WHICH THE PENDING CASE WAS DISCUSSED. BUT ALSO CONTINUED HIS LONG STANDING NEGOTIATIONS FOR A GUILTY PLEA THROUGH TWO FULL DAYS OF TRIAL IN WHICH HE SHARED FULLY IN ALL DEFENSE STRATEGIES AND CONFIDENCES. THEN ENTERED A GUILTY PLEA AND PROMPTLY BECAME A GOVERNMENT WITNESS AGAINST THE REMAINING DEFENDANTS IN THE SAME TRIAL. OVER TIMELY OBJECTION AND MOTION FOR MISTRIAL. HAVE THE RIGHTS OF THE DEFENDANTS-PETITIONERS BEEN UNCONSTITUTIONALLY COMPROMISED?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT FIVE

No person shall be held to answer for a capital. or otherwise infamous crime. unless on a presentment or indictment of a Grand Jury. except in cases arising in the land or naval forces. or in the Militia. when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself. nor be deprived of life. liberty. or property. without due process of law; nor shall private property be taken for public use. with just compensation.

AMENDMENT SIX

In all criminal prosecutions. the accused shall enjoy the right to a speedy and public trial. by an impartial jury of the State and district wherein the crime shall have been committed. which district shall have been previously ascertained by law. and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. and to have the Assistance of Counsel for his defense

STATEMENT OF THE CASE

A. HISTORY

Petitioners are four individuals of the original eight named in the indictment [A-15] which was returned on 18 September 1975, in the Northern District of Georgia. That indictment was laid in two counts, the first charged a conspiracy to possess marijuana with the intent to distribute it, the second charged a substantive offense of possessing marijuana with the intent to distribute the same. The petitioners were charged together with one Woodrow Seibert [who was eliminated from the case at the close of the government's case by directed judgment of acquittal] and three persons named Barber, namely, William J. Barber, his wife, Mrs. William J. Barber and his son, William A. Barber; the two Barber males were also respectively alleged to be also known as Jack Pruitt and Bill Pruitt. The latter named was severed from trial with the others at the opening of the trial. After two full days of trial, the defendant William J. Barber, pursuant to negotiations with the government, changed his plea to guilty. Those negotiations included not only the sentencing of William J. Barber but also the dismissal of all charges against his wife and son. Thusly, the four petitioners remained for trial, became convicted, appealed and the convictions were affirmed.

B. FACTS

Following indictment and arraignment, the defendant William J. Barber went to the Drug Enforcement Administration and became a paid informant. Knowledge of this was imparted to the prosecutor in this case. It was while he was functioning as an informant that certain agents directed him to arrange a meeting between those agents and the Defendant Joseph Edward Kilrain, of course a cover story was developed so as to conceal from the defendant Joseph Kilrain any knowledge of their true identity. The defendant-turned-informant complied and caused such a meeting to occur. The parties at the meeting brought the conversation to the pending case against the defendant Kilrain and they discussed it. The agents kept the prosecutor informed

of these circumstances. The prosecutor as well as the agents knew that not only had the defendant Kilrain been arraigned but also that he was represented by counsel. Of course, his counsel was not informed of the meeting. During this period of time the informant had also initiated talks aimed at arriving at a negotiated plea for himself.

During the motion stage prior to trial, the defendants sought certain information through bill of particulars. Hearing upon the motion resulted in an order requiring the government to furnish through particulars *all* of the overt acts which the government intended to introduce into evidence during the trial, and this, together with the date at which the charged conspiracy came into being. The government in no way objected or remonstrated to the requirement to supply by particulars *all* of the "overt acts" the government intended to introduce at the trial and not mentioned in the indictment. The government did supply a *date* at which the alleged conspiracy existed, it set forth "March 1976". The date last mentioned was clearly spurious since the alleged conspiracy ended with arrest and the indictment in September, 1975. The government *never* amended or offered to amend the date or to explain the use of that date. Too, the government never set forth *any* overt acts in addition to those mentioned in the indictment itself; those acts embraced only the period of June 1975 through July of the same year (a period of some two months).

At the trial the government introduced, over objection, many, many "overt acts" that were never mentioned in any way prior to trial. Never did the government, directly or indirectly, present anything in an effort to excuse or even explain the absence of any effort to impart knowledge of the additional overt acts to the defense. Just as in the appellate court, the government merely asserted it was not obliged to comply with the order.

The overt acts which were never revealed, embraced one or more alleged conspiracies that were different than the one described in the indictment and had as their nexus only the fact that one or perhaps two of the defendants [petitioners herein] were also included in those conspiracies. Further they related to a distinctly earlier period of time, namely, 1974.

After two full days of trial had transpired, and in the second day of which the defendant-petitioners were furnished,

as Jenck's material, a report that clearly reflected the defendant William J. Barber was an informant and had arranged the meeting between the defendant Joseph Kilrain [Duffy] and the under cover DEA agents, the informant engaged in further late-night negotiations with the prosecutor. During the two days of trial, all defense counsel conferred jointly and their clients participated with them in all the information, confidences and strategies.

On the morning of the third day the defendant-informant William J. Barber entered a negotiated plea of guilty. His wife and son were dismissed as parties defendant. Later, in the same trial he testified against the petitioners, despite their objections which were overruled and their motions for mistrial which were denied.

The trial ended with each of the petitioners being found guilty by jury verdict. Appeal and affirmance of the convictions followed.

REASONS FOR GRANTING THE WRIT

1. The failure and unexplained refusal of the government to furnish, as a bill of particulars, *all* of the overt acts it intended to put into evidence at trial as well as the date the conspiracy first existed, all as ordered by the trial court long prior to trial followed by a wholesale introduction of previously undisclosed "overt acts", over objection, which completely surprised the petitioners at trial, denied them due process and a fair trial.

There is no question but that the petitioners by a timely motion for bill of particulars sought to require the government to provide them a complete disclosure of *all* the "overt acts" the government intended to introduce in evidence beyond those mentioned in the indictment. It is equally clear that the magistrate upon hearing the motion granted that particular sought by the petitioners and *required* the government to promptly furnish the petitioners *all* of the overt acts the government *intended to introduce* at trial. The government never sought any modification of that order of the District Judge assigned to the case [Honorable Newell Edenfield], and at all times did everything to indicate it would comply with the order. It was also required to furnish the date by which the charged conspiracy existed. The prosecution *never* set forth any overt acts in addition to those charged in the indictment; but it furnished a date, "March 1976". The arrests commenced in July 1975 and indictment was returned in September 1975 [it superseded an earlier indictment returned in August 1975]; the date, therefore, was in effect no date at all.

Since *no* additional particulars were furnished, nor suggested in any manner whatsoever by the government, the petitioners relied upon the fact the prosecution would attempt to adduce evidence only upon those overt acts contained in the indictment. The overt acts mentioned in the indictment embraced a period of time which had as its earliest date June of 1975 and its latest date July 1975, a period of some two months. Those overt acts generally, described circumstances where the petitioners assertedly obtained marijuana from the Barbers in Texas for distribution in and about the Atlanta, Georgia, area during the period last aforesaid.

The trial was presided over not by the Judge to whom it had been assigned [Honorable Newell Edenfield] and allowed the order requiring the particulars to remain in force and effect but rather by a visiting Judge [Honorable Wilbert D.Owens, Jr.] who had no part in the pretrial orders in the case.

At the trial, the government offered evidence of numerous "overt acts" which were entirely foreign to the only overt acts particularized prior to trial. The overt acts found in the indictment embrace a period of time between June and July 1975, while "overt acts" offered at the trial related to episodes allegedly occurring in 1974. The overt acts in the indictment describe circumstances embracing the petitioners conspiring to receive marijuana from the Barbers in Texas, while "overt acts" offered at the trial were of acts where the Petitioner Joseph [Duffy] Kilrain purportedly received marijuana from a

person or persons which in no way included the Barbers. In some instances, these previously undisclosed overt acts included the petitioner Richard Otho Piper. Of course, the petitioner timely objected to these overt acts but they were admitted over objection nevertheless.

The petitioners were thusly wholly surprised by "overt acts" which related to an entirely separate and distinct conspiracy than the one described in the indictment. [NOTE: the *multiple* conspiracies situation is fully treated in point two, *infra*].

The Court of Appeals below was squarely presented these circumstances by the appeal and by its opinion [A-8, notes 11-13] merely dispatched the issue by asserting the defendants [petitioners] were not *entitled* to the particulars. However, as authority for its holding it cited *United States v. Murray*, 527 F. 2d 401, 411 (5th Cir. 1976) and *United States v. Perez*, 489 F. 2d 51, 70-71 (5th Cir. 1973) *cert. denied* 417 US 945 (1974). Those cases are simply not authority for the government to willfully and intentionally fail and refuse to comply with a valid order of the court requiring the furnishing of particulars. In the cases last cited the defendants moved for a bill of particulars which sought all of the overt acts that the government intended to use, but the trial court *denied* rather than *granted* the motion and did *not* require the government to set forth the overt acts. On appeal the defendants-appellants urged error by the trial court having denied the particulars to the defendants, the appeals court found no error. Vastly different is the case *sub judice*, for it *did require* the government to furnish *all* the overt acts the government intended to introduce at trial.

Of what value is a competent defense counsel who diligently pursues his pretrial discovery and obtains an order *requiring* particulars from the government if the government may without just cause or reason, willfully refuse to comply and put the defendants to "trial by ambush"? Willful violations of discovery rules are not countenanced by the courts; "trial by ambush" is condemned. *United States v. Kelly*, 420 F. 2d 26 (2nd Cir. 1970) Where discovery has been ordered though not furnished through inadvertence but furnished

promptly upon discovery of the inadvertent omission *and* no harm to the defendant is demonstrated, reversal is not compelled. *United States v. Joyner*, 494 F. 2d 501 (5th Cir. 1974); *United States v. James*, 495 F. 2d 434 (5th Cir. 1974). Even the court below has earlier said the government cannot withhold evidence contrary to an order, it must comply with the letter and the spirit of the order. *Pierce v. United States*, 414 F. 2d 163 (5th Cir. 1974). When the previously unrevealed overt acts were offered, they came as a complete surprise and left the petitioners wholly unprepared to deal with them. The petitioners were not offered a continuance to prepare for the unexpected. Compare: *United States v. Joyce*, 499 F. 2d 9 (7th Cir. 1974). The petitioners were compelled to alter their defense, *United States v. Padrone*, 406 F. 2d 560 (2nd Cir. 1969), during the trial itself, thereby precluding the constitutional guarantees afforded a defendant in a criminal case solely through the willful actions of the government, in direct violation of a court order.

> 2. When the government first willfully failed to furnish all the overt acts it intended to introduce at trial as ordered prior to trial, the subsequent introduction of those acts was such that it failed to establish the conspiracy charged and created a circumstance of the multi-conspiracies condemned by this court and held reversible error.

If the decision of this court announced in *Kotteakos v. United States*, 328 US 750 (1946) remains viable law, the case presented by this petition represents an instance of utter and irreconcilable conflict by the decision of the Court of Appeals.

In the *Kotteakos* case prosecution for a conspiracy was undertaken by the government. The proofs submitted in support of the one conspiracy charged established a number of conspiracies that had as their sole common denominator the fact that one of the conspirators was common to each and every of the conspiracies. Thusly, urged the prosecution, it reflected but a single conspiracy since the objective of each was a like end. This court reversed holding the single conspiracy

charged could not be established through proof of multi-conspiracies with similar objectives though one of the participants was common to each conspiracy.

In the instant case the indictment and its overt acts describes a single conspiracy which included the petitioners obtaining marijuana from the three defendants named Barber in Texas and transporting it for distribution in the Atlanta, Georgia area; it defines the period as from June through July 1975. When the government surprised the defense with overt acts additional to those in the indictment and contrary to the order requiring the government to disclose *all* the overt acts it intended to introduce in trial, those "overt acts" established precisely what the *Kotteakos* case condemned, to-wit, multiple conspiracies. Those previously unrevealed "overt acts", if anything, tended to show that the defendant Joseph [Duffy] Kilrain and in some instances the Defendant Richard Otho Piper did allegedly conspire with other persons [a "Zeke" and an "Oscar"] and others than the Barbers to obtain marijuana and this was during the year 1974 and perhaps January 1975, but not June through July 1975.

It need be remembered that those other purported conspiracies did not attempt to include the petitioners Jo Ann Davis and Jack Kilrain in any way and only partially embraced the petitioner Richard Otho Piper, it would appear as harmful error to them. *United States v. Butler*, 494 F. 2d 1246 (10th Cir. 1974). This variance in proof from the charge in the indictment could only operate to transfer guilt. *United States v. Cruz*, 478 F. 2d 408 (5th Cir. 1973); *United States v. Miley*, 513 F. 2d 1191 (2nd Cir. 1975).

The petitioners were wrongly convicted and that conviction was affirmed improperly by the appeals court. Compare also: *United States v. Goss*, 329 F. 2d 180 (4th Cir. 1963); *Rocha v. United States*, 288 F. 2d 545 (9th Cir. 1961); *Daily v. United States*, 282 F. 2d 818 (9th Cir. 1960).

3. The use of one defendant as a paidinformant, who without knowledge on the part of the petitioners, arranged a meeting between DEA agents (acting under cover) and one of the petitioners so that they among other things, were able to discuss the pending case; and, that informant continued negotiations for entry of a guilty plea with the prosecutor through two full days of trial where he fully shared in defense strategies and confidences, only to change his plea and promptly become a government witness against the remaining defendants-petitioners, resulted in unconstitutionally compromising the rights of petitioners.

Shortly after arrest and arraignment in this case, the defendant William J. Barber sought out Drug Enforcement Administration agents and became a paid informant for that agency. While functioning as an informant, DEA agents had the informant arrange a meeting between the petitioner Joseph Edward [Duffy] Kilrain and DEA agents. The latter were acting in an undercover capacity and concealed their true circumstances from the petitioner. The prosecution was informed of these circumstances and the meeeting as they occurred. During their meeting the agents discussed the circumstances of the pending case with the petitioner Duffy Kilrain.

The paid informant also initiated negotiations with the prosecution in an effort to dispose of his case in a manner which would satisfy the informant-defendant. The negotiations were not mutually agreed upon and the informant's activities as such dwindled off to nothing not too long after he started. He never formally withdrew from the informant status, they did not have anything in particular for him to do so it became a dormant relationship.

Subsequently as trial was to commence the defendant William A. Barber, the son of William J. Barber stated he was experiencing problems in his ability to have counsel represent him; he was severed from the trial. The witness rule had been invoked. The defendants did not anticipate in any way being able to use the defendant William A. Barber as a witness. However, the government was very adamant in its insistence that he be made to leave the courtroom, at least indicating thusly the government may have been considering his use as a witness.

After two full days of trial and when certain Jenck's materials were furnished the defendants-petitioners, they first learned the defendant William J. Barber had been functioning

as a paid-informant for the DEA and had arranged the meeting where the DEA agents discussed the case with petitioner Duffy Kilrain. During the first two days of trial the defendant-informant William J. Barber participated and indulged in all the strategy discussions and confidences which occurred with the defense. He knew exactly what were deemed weaknesses of the prosecution by the defense and all of the matters generally discussed by way of defense. It was late the night of the second day of trial that the prosecutor finally agreed to the terms the defendant had been negotiating from long prior to trial. The terms included the dismissal of charges for his wife and son, a guilty plea on his part with the government recommending probation as well as government agreement for immunity for any and all other charges he might be subject to, and the agreement to testify against the remaining defendants, the petitioners here.

The government knew as it entered trial that it was negotiating with the defendant-informant. It surely knew of its proofs and where the same were weak or required additional testimony. With the matter of a second trial being necessitated by reason of the defendant-informant's son being severed, the government was in a position to merely sever the defendant-informant (and perhaps his wife, too) from the trial with the petitioners. It would have removed the defendant-informant who turned government witness from sharing *any* additional defense strategies and confidences and would have removed him from the position of having heard all the testimony of the other witnesses (the rule was invoked and witnesses excluded from the courtroom). Since he heard that testimony and knew precisely the defense posture. He was thusly enabled to press his negotiations by offers to testify upon the weakened points and the absent points, the points deemed vital to the prosecution. Since the negotiation resulted in the plea it is obvious the terms were met. With negotiations continuing to the late night hours, the entire circumstances of the case from *both* the prosecution *and defense* had to have been discussed. It resulted in *all* of the suppliers of the marijuana escaping trial: two being dismissed and the third receiving probation.

There is no way of knowing just how much of the conversations with co-defendants and their counsel was touched

upon, directly or indirectly, and how much of the evidence [even testimony of the defendant-informant, government witness] was developed as a result of that defendant being armed with *all* of the defense strategies and confidences as well as the testimony of all the witnesses who preceded him in trial. See *Weatherford v Bursey*, ____ US ____, 97 S.Ct. 837 (1977); *Caldwell v United States*, 92 U.S. App. D.C. 355, 205 F. 2d 879 (1953); *Coplon v United States*, 89 U.S. App. D.C. 103, 191 F. 2d 749 (1951). That defendant-witness at all times affirmatively asserted himself into all of the conferences between petitioners and their counsel just as counsel between them and in the presence of their clients discussed the case. The government could as well have accepted the negotiations for the plea at the outset of trial rather than two full days into trial. The strategy appears *deliberate*, equally as deliberate as the prosecution's willful refusal to furnish particulars ordered by the court. Such strategy is only calculated to deprive the petitioners of the effective assistance of their counsel in violation of the Sixth Amendment of the United States Constitution. The appeals court in an earlier opinion clearly stated that if a defendant can establish that a co-defendant was an agent provocateur, new trial was mandated. *United States v Klein*, 546 F. 2d 1259, 1264 (5th Cir. 1977).

It was not the first occasion that the government made an incursion into the defense. That defendant-turned-witness had earlier, with the full knowledge of the prosecutor, become a paid-informant and at the specific request of the DEA agents he worked under for the government, arranged a meeting between the petitioner Duffy Kilrain and DEA agents (working undercover) and thusly discussed the pending case with that petitioner. It was in the absence of his counsel and without notice to him. *Massiah v United States*, 377 US 201 (1964); *Brewer v Williams*, 430 US (1977). These hold that an individual against whom prosecution has commenced has a right to legal representation when the government interrogates him; it was not respected in this case but rather deliberately violated with the full actual knowledge of the prosecutor.

The petitioner's rights pursuant to the Sixth Amendment have been wrongfully compromised.

CONCLUSION

For the reasons set forth above, the petition for Writ of Certiorari should be. . .
GRANTED.

Respectfully submitted,

BY: _____

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I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by mail to Honorable Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C., 20530, this 20 March 1978.

BY: _____

RAY SANDSTROM

APPENDIX

1. Opinon and Judgment of the Court of Appeals, Fifth Circuit
A-1 to A-12

2. Order denying rehearing
A-13

3. Order staying mandate pending certiorari proceedings
A-14

4. Indictment
A-15 to A-18

UNITED STATES v. KILRAIN

UNITED STATES of America,
Plaintiff-Appellee,

v.

Joseph Edward KILRAIN, a/k/a Duffy, Jo Ann Davis, Richard Otho Piper, and Jack Kilrain, a/k/a Jack Hickey and John Hickey, Defendants-Appellants.

No. 76-3947

United States Court of Appeals,
Fifth Circuit.

Jan. 30, 1978.

Defendants were convicted in the United States District Court for the Northern District of Georgia, Wilbur D. Owens, Jr., J., of conspiracy to possess and distribute marijuana and of possession with intent to distribute. Defendants appealed, and the Court of Appeals, Ainsworth, Circuit Judge, held that: (1) defendants' Sixth Amendment right to effective assistance of counsel was not impermissibly compromised by the fact that federal undercover agents and an informant met with one of the defendants after he had been indicted; (2) no Sixth Amendment violation resulted from the fact that the government informant, who had been indicted with the defendants, was privy to defense strategy during the first two days of trial; (3) the affidavit in support of a warrant to search a motor home sufficiently established the reliability of the informant; (4) certain errors in the affidavit did not negate probable cause; (5) evidence was sufficient to support the conviction of one of the defendants for

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constitute no part of the opinion of the court.

conspiracy and for aiding and abetting; (6) an alleged speedy trial violation did not warrant dismissal; (7) the fact that the bill of particulars furnished by the Government did not include all overt acts which the prosecution introduced at trial was not error, and (8) any error that might have been committed in connection with the Government's failure to disclose notes of government agents or in connection with the trial court's restrictions on questioning and closing remarks was harmless beyond a reasonable doubt.

Affirmed.

1. Criminal Law 1169.12

Not every interrogation in violation of exclusionary rule for statements obtained as a result of an interrogation conducted after indictment and without the presence of defendant's counsel mandates reversal of a conviction.

2. Criminal Law 412.2(4)

Where undercover agents and government informant who conversed with defendant after he had been indicted did not testify at trial as to the substance of those discussions and in absence of any demonstration that any of the Government's evidence was obtained as a result of the converstions with defendant, conversations did not give rise to any evidence subject to exclusionary rule for statements obtained as a result of a post-indictment interrogation conducted without the presence of defendant's counsel and, therefore, no Sixth Amendment rights were violated by fact that federal undercover agents and an informant met with defendant after he had been indicted and discussed, among other things, the approaching trial of marijuana conspiracy case. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 21 U.S.C.A. §§ 841, 846; U.S.C.A.Const. Amend. 6.

3. Criminal Law 641.12(1)

Defendants charged with conspiracy to possess and distribute marijuana were not deprived of their Sixth Amendment right to the effective assistance of counsel by fact that government informant who had been indicted with defendants stood trial with them for four days before pleading guilty and becoming a government witness; under all circumstances including fact that the informant had ceased operating as a government informant well before trial began and apparently did not communicate any knowledge of defense strategy to the Government, fact that informant was privy to defense strategy for the first two days of trial did not violate the Sixth Amendment. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 21 U.S.C.A. §§ 841, 846; U.S.C.A.Const. Amend. 6.

4. Searches and Seizures 3.6(3)

Where affidavit in support of search warrant was made by a government agent based on information received from another government agent who in turn was given the information by a confidential informant, affidavit stating that the informant had within the preceding 30 days provided information on at least six occasions to the second government agent and that the agent had personally verified the information and stating that the informant had provided a certain telephone number and that the number had been traced and found to be located at address where agents discovered a motor home which the informant had described fully satisfied the requirement that affidavit in support of search warrant establish the reliability of an informant.

5. Searches and Seizures 3.6(2)

Misrepresentations in affidavits as to facts that are material to the establishment of probable cause for search negate probable cause if such misrepresentations are negligent or deliberate on the part of the affiant.

6. Drugs and Narcotics 188

In absence of any suggestion that there was deliberate misrepresentation, errors found in affidavit in support of search warrant did not negate probable cause where errors concerned the identity of the driver and the exact amount of marijuana in motor home for which search warrant was sought.

7. Drugs and Narcotics 183

Neither the exact amount of marijuana nor the name of the driver is necessary for probable cause to search a vehicle claimed to contain marijuana.

8. Criminal Law 1144.13(3)

On appeal from conviction, Court of Appeals must consider evidence in light most favorable to Government.

9. Conspiracy 47(12)
Drugs and Narcotics 123

In prosecution for conspiracy to possess and distribute marijuana and possession with intent to distribute, evidence that defendant had previously knowingly received and delivered payments for marijuana transactions, that telephone calls regarding marijuana purchases were made and received at her home and some were received by her, that motor home containing marijuana was parked outside her apartment on the day it was searched and that co-conspirators used defendant's apartment to await the arrival of the marijuana was sufficient to support convictions for con-

spiracy and for aiding and abetting the possession of marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 21 U.S.C.A. §§ 841, 846.

10. Criminal Law 576(1)

Dismissal for violation of speedy trial rules is not required where delay is minimal and no prejudice resulted.

11. Indictment and Information 121.4

In narcotics conspiracy prosecution, no error resulted from fact that bill of particulars furnished by Government did not include all overt acts which the prosecution introduced at trial; defendants were not entitled to discover all the overt acts that might be proved at trial. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 21 U.S.C.A. §§ 841, 846.

12. Indictment and Information 121.1(7)

A defendant should not use the bill of particulars to obtain a detailed disclosure of the Government's evidence prior to trial.

13. Criminal Law 1167(1)

Fact that bill of particulars contained typographical mistake in that it stated that the conspiracy existed by March, 1976, while Government in fact had seized the marijuana in the summer of 1975 was not a source of reversible error. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 21 U.S.C.A. §§ 841, 846.

14. Criminal Law 1166(1), 1171.1(2), 1171.8(1)

Where Government's proof was especially strong in that it included seized contraband and testimony of two participants in marijuana conspiracy, any error that might have been committed in connection with failure to disclose rough notes of government agents or by reason of trial court's rulings on questioning and closing remarks was harmless error beyond a reasonable doubt. 18 U.S.C.A. § 3500.

15. Costs 317

Where defendant admitted to the court that he could "handle" $50 a month in addition to his current debts, order that defendant pay a portion of the cost of copying the transcript was not improper.

Appeal from the Unites States District Court for the Northern District of Georgia.

Before AINSWORTH, SIMPSON and MORGAN, Circuit Judges.

AINSWORTH, Circuit Judge

Defendants Joseph Edward Kilrain, Jack Kilrain, Jo Ann Davis and Richard Otho Piper were convicted of conspiracy to possess and distribute marijuana in violation of 21 U.S.C. § 846. All the defendants, except Jack Kilrain, were also convicted of possession with intent to distribute under 21 U.S.C. § 841. Defendants seek reversal on the basis that their Sixth Amendment right to effective assistance of counsel was impermissibly compromised when federal undercover agents and an informant met with defendant Joseph Kilrain (hereinafter Kilrain) after he had been indicted. Kilrain, the informant and the agents discussed, among other things, the approaching trial of this case. A Sixth Amendment violation is also claimed on the ground that the government informant had been indicted with the defendants, and stood trial with them for four days before pleading guilty and becoming a government witness. Defendants also contest the validity of the search warrant, arguing that the affidavits supporting the warrant contained incorrect statements. Third, defendant Davis urges that the evidence was insufficient to support her convictions. The fourth contention concerns an alleged failure to comply with the district court's Speedy Trial Plan. Finally, defendants claim that certain deficiencies in the Bill of Particulars, in supplying materials in compliance with the Jencks Act, and in limiting cross-examination of a crucial government witness mandate reversal. We affirm.

William J. Barber, his wife and his son were indicted along with the defendants. Soon after the indictment Barber volunteered to become a paid informant for the Drug Enforcement Administration (DEA). Nothing was said to Barber regarding informing on the defendants in this case. After Barber became an informant, defendant Kilrain telephoned him concerning the purchase of additional narcotics. Barber and Kilrain had several meetings at which DEA undercover agents were also present. At these meetings Kilrain, Barber and the agents discussed future drug transactions, Kilrain's desire to have the member of the conspiracy who had informed the DEA killed, and the forthcoming trial of Barber and Kilrain. Soon after these meetings Barber ceased to be an informant. Barber unsuccessfully negotiated with the prosecution for a plea bargain before trial. Two days after the trial began, and after the fact that he had been an informant had been disclosed, Barber decided to plead guilty. The charges against his wife and son were then dismissed. Barber testified at trial but did not relate any of the conversations at the meetings with

Kilrain when Barber was a paid informant.[1]

Defendants contend that the conversations between Kilrain, Barber and the undercover agents regarding the impending trial without the presence of Kilrain's attorney violated the Sixth Amendment. Reliance is placed on the Supreme Court's decisions in *Massiah v. United States*, 377 U.S. 201, 84 S.Ct.1199, 12 L.Ed.2d 246 (1964) and *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), where the Court held that post-indictment interrogation of a defendant without the presence of counsel was unconstitutional. The second point of defendants' analysis concerns the presence of Barber amongst the defendants and their counsel during the first two days of trial. Defendants insist that they suffered a deprivation of the Sixth Amendment right to the effective assistance of counsel on account of Barber being privy to the defense strategy and his subsequent cooperation with the prosecution.

[1,2] In *Massiah* and *Brewer* the Supreme Court established an exclusionary rule for statements obtained as a result of an interrogation conducted after indictment and without the presence of defendant's counsel.[2] The present case is distinguishable from the situation in *Massiah* and *Brewer*. The agents and the informant who conversed with Kilrain did not testify at the trial as to the substance of those discussions, and defendants have not demonstrated that any of the prosecution's evidence was obtained as a result of the conversations with Kilrain. Not every interrogation in violation of the rule set forth in *Massiah* and *Brewer* mandates reversal of a conviction.[3] Unlike the cited cases, there is no evidence to exclude in the present case, and no prejudice has been shown by the defendants.

1. Barber did reveal some of the substance of the conversations during the bail revocation hearing. Barber had heard Kilrain threaten the life of an informant, and express the possibility of flight from justice. However, this testimony is not relevant to the issue on appeal, as it was not presented in the Government's case against the defendants.

2. *See Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 1240, 51 L.Ed.2d 414 (1977): "the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."

3. *See United States v. Hayles*, 5 Cir., 471 F.2d 788, 793, *cert. denied*, 411 U.S. 969, 93 S.Ct. 2159, 36 L.Ed.2d 690 (1973) (assuming arguendo that tapes were introduced in evidence in violation of *Massiah*, admission was harmless beyond a reasonable doubt).

   Cf. Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 1243 n. 12, 51 L.Ed.2d 424, where the Court recognized that the proper rule was one of exclusion of tainted evidence rather than a *per se* standard of reversal if any constitutional violation had occurred.

[3] Defendants' other Sixth Amendment argument is equally meritless. The purported impropriety is that Barber, who had previously been a paid informant, and who subsequently pleaded guilty and testified against the defendants, was privy to defense strategy for the first two days of trial. It must be remembered that the evidence indicated that Barber had ceased operating as a government informant well before trial began. The evidence also showed that Barber had unsuccessfully negotiated with the prosecution for a plea bargain before trial. Defendants rely heavily on several cases involving a government informant who intrudes on or overhears conversations between a defendant and his counsel. *See United States v. Klein*, 5 Cir., 1977, 546 F.2d 1259, 1264 (suggesting in dicta that if defendant can prove that the co-defendant was an agent provocateur, defendant would be entitled to a severance or a new trial);[4] *Coplon v. United States*, 1951, 89 U.S.App.D.C. 103, 191 F.2d 749, *cert.denied*, 342 U.S. 926, 72 S.Ct. 363, 96 L.Ed. 690 (1952), and *Caldwell v. United States*, 1953, 92 U.S.App.D.C. 355, 205 F.2d 879, *cert. denied*, 349 U.S. 930, 75 S.Ct. 773, 99 L.Ed. 1260 (1955) (condemning intrusions on attorney-client conversations by wiretapping and secret agents).[5] This is not such a case. There is no evidence that Barber was an informant when he was a defendant during the first two days of trial. This is not an instance of knowing intrusion on the attorney-client relation by the Government, but rather an independent decision by a codefendant to change his plea to guilty.[6] In any case, defendants have not demon-

4. The *Klein* case was decided a few days before *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977), which held that in a similar situation involving an undercover co-defendant, the defendant must demonstrate prejudice, or at the very least, receipt of the unconstitutionally acquired evidence by the Government. *See* note 8, *infra*. As the *Klein* court's dicta regarding the possibility of collateral attack of the conviction did not include the factor of prejudice, it must be considered a very weak precedent indeed.

5. Both *Coplon* and *Caldwell* relied on statements in *Glasser v. United States*, 315 U.S. 60, 75-76, 62 S.Ct. 457, 467-68, 86 L.Ed. 680 (1942), to the effect that no prejudice need be shown once a violation of the constitutional right to effective assistance of counsel has been demonstrated. As *Glasser* involved the fundamental issue of an attorney's conflicting loyalties, it should not be taken as establishing a general rule against demanding proof of use or prejudice in an agent provocateur case. *See Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 842-43, 51 L.Ed.2d 30 (1977), where the Court seemed to reject *Caldwell* and *Coplon*, disclaiming that it had adopted the reasoning of those two cases in *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). The Court explained that in *Hoffa* it had merely assumed the validity of *Coplon* and *Caldwell* for the purpose of demonstrating that Hoffa's claim would not even be protected under those two cases.

6. *Cf. United States v. Klein*, 5 Cir. 1977, 546 F.2d 1259, 1264, where the Court enumerated the factors required to justify a severance or new trial, and included knowledge on the part of the Government that the co-defendant was an informant or agent provocateur.

strated any actual prejudice resulting from Barber's supposed knowledge of defense strategy, or that Barber communicated such knowledge to the Government.[7] The Supreme Court has recently held that when an agent posing as a defendant in order to preserve his cover meets with a defendant and his counsel and discussed the forthcoming trial, and defendant demonstrates neither prejudice nor receipt of such confidential information by the Government, there is no violation of the Sixth Amendment as applied to the states by the Fourteenth Amendment, and relief under 42 U.S.C. § 198 is not warranted. *See Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 841-42, 845, 51 L.Ed.2d 30 (1977).[8]

The next question is whether the affidavits submitted to the magistrate supported issuance of the search warrant for the motor home in which the marijuana was found. Defendants Joseph Kilrain, Davis and Piper appeal the denial of their motion to quash the search warrant and to suppress the evidence seized during the search. Defendants claim that the search warrant was improperly issued because the reliability of the informant had not been established[9] and that the affidavits supporting the warrant contained material errors. We find neither contention meritorious.

7. *See Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 844, 51 L.Ed.2d 30 (1977): "[n]or do we believe that . . . prosecutors will be so prone to lie or the difficulties of proof so great that we must always assume not only that an informat communicates what he learns from an encounter with the defendant and his counsel, but also that what he communicates has the potential for detriment to the defendant or benefit to the prosecutor's case."

8. The Court declared that "when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial. This is a far cry from the *per se* rule announced by the Court of Appeals below, for under that rule trial prejudice to the defendant is deemed irrelevant." *Id.*, 97 S.Ct. at 842.

The Court went on to suggest more specific standards to determine whether prejudice has resulted from the Government's intrusion on the attorney-client relationship. The Court mentioned several factors that would give a defendant "a much stronger case": testimony as to the content of attorney-client conversations; whether prosecution evidence originated in the conversations or the conversations were in any other way used to the substantial detriment of the defendant; and even whether the Government had learned the details of a conversation about trial preparations. *Id.*, 97 S.Ct. at 843.

9. *Jacobs v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), established a two-pronged standard for evaluating the sufficiency of affidavits concerning the statements of informants. First, the affidavit must set forth the underlying circumstances that support the requisite high degree of suspicion. Second, the underlying circumstances indicating the reliability of the informant must be given.

[4] The affidavit was made by a government agent in Georgia, and was based on information received from another government agent in Texas who in turn was given the information by a confidential informant. The affidavit stated that the informant had within the preceding thirty days provided information on at least six occasions to the government agent in Texas, and that the agent had personally verified the accuracy of such information. In addition the affidavit stated that the informant had given a telephone number in Atlanta, and that the number had been traced and found to be located at the address where government agents discovered the motor home which the informant had described. Thus, the requirement of establishing the reliability of the informant in the affidavit was fully satisfied.

[5-7] The errors in the affidavit are of a relatively trivial character, and despite them there was still probable cause to support issuance of the warrant. Misrepresentations in affidavits as to facts that are material to the establishment of probable cause will negate probable cause if such misrepresentations are negligent, *see United States v. Astroff*, 5 Cir., 1977, 556 F.2d 1369, 1372-74 (rehearing en banc granted, 5 Cir., 564 F.2d 199); or if the misrepresentation is deliberate on the part of the affiant, *see United States v. Thomas*, 5 Cir., 1973, 489 F.2d 664, 668-69, *cert. denied*, 423 U.S. 844, 96 S.Ct. 79, 46 L.Ed.2d 64 (1975). These problems do not exist in the present case. The exact amount of marijuana in the motor home and the identity of the driver are the only two misrepresentations at stake here. Neither the exact amount of marijuana nor the name of the driver is necessary for probable cause to search a vehicle claimed to contain marijuana. There is no suggestion that there was deliberate misrepresentation.

[8,9] Defendant Davis claims that the evidence was insufficient to support her convictions for conspiracy and for aiding and abetting. In reviewing the evidence, we must consider it in the light most favorable to the Government, *see Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). The evidence of conspiracy and aiding and abetting the possession of marijuana with the intent to distribute is ample in the case of defendant Davis. She was defendant Piper's paramour, and had previously knowingly received and delivered payments for marijuana transactions, in one instance marking the debt paid in a book. Telephone calls regarding marijuana purchases were made and received at Davis' home, and some were received by her. The motor

home containing the marijuana was parked outside her apartment on the day it was searched. The prosecution's informer testified that Davis had a pound of marijuana in her apartment, and that the conspirators used her apartment to await the arrival of the marijuana. Under the circumstances, the jury properly could have found that Davis was part of the conspiracy along with her lover Piper, and that Davis aided and abetted Piper's possession of marijuana with the intent to distribute.

[10] Immediately prior to trial the defendants moved for a discharge on the ground of denial of speedy trial. The original indictment was returned on August 12, 1975, and was superseded by a nearly identical indictment on September 18, 1975. The trial began on September 13, 1976. Trial was originally scheduled for July 1976, but the defendants requested a continuance until August 23, 1976. Defendants argue that the applicable Speedy Trial Plan of the district court required trial of the conspiracy count within one year, and the possession count within 180 days. The Government replies that the Speedy Trial Plan relied on by defendants was superseded by a new plan effective July 1, 1976, and that the trial was timely under the new plan. We need not decide which plan should apply, as defendants have not suggested that prejudice has resulted from trial approximately one year after indictment. Dismissal is not required where delay is minimal and no prejudice has resulted. *See United States* v. *Garcia*, 5 Cir., 1977, 553 F.2d 432; *United States* v. *Wyers*, 5 Cir., 1977, 546 F.2d 599, 602; *United States* v. *Maizumi*, 5 Cir., 1976, 526 F.2d 848, 851; *United States* v. *Clendening*, 5 Cir., 1976, 526 F. 2d 842.

[11-13] Defendants contend that the Bill of Particulars furnished by the Government did not include all of the overt acts which the prosecution introduced at trial. This was not error, as defendants are not entitled to discover all the overt acts that might be proved at trial, *see United States* v. *Murray*, 5 Cir., 1976, 527 F.2d 401, 411. A defendant should not use the Bill of Particulars to "obtain a detailed disclosure of the government's evidence prior to trial," *see United States* v. *Perez*, 5 Cir., 1973, 489 F.2d 51, 70-71, *cert. denied*, 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974). Defendants have also pointed out an error in the Bill of Particulars. The Bill of Particulars stated that the conspiracy existed by March 1976. However, the Government seized the marijuana in the summer of 1975. This obvious typographical mistake cannot seriously be considered a source of reversible error.

[14] Finally, defendants raise several minor issues which they contend mandate reversal. The rough notes of the government agents were not furnished as Jencks Act materials, nor were all the Jencks Act materials furnished the night before a witness was to testify, as the Government had promised. In addition, defendants asserted that the trial court improperly restricted questioning and closing remarks, and allowed expansive answers and leading questions. The Government's proof in this case was especially strong, as it included the seized contraband and the testimony of two participants. Thus, whatever error urged by the defendants that might have been committed by the trial court was certainly harmless beyond a reasonable doubt. *See Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L. Ed.2d 705 (1967).

[15] Defendant Jack Kilrain complains that he should not have been ordered to pay a portion of the cost of copying the transcript, as he was shown to be indigent. This contention is rebutted by Kilrain's admission to the court that he could "handle" fifty dollars a month in addition to his current debts.

AFFIRMED.

Adm. Office, U.S. Courts - West Publishing Company, Saint Paul, Minn.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 76-3947

D.C. Docket No. CR-75-403(A)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH EDWARD KILRAIN, a/k/a Duffy, JO ANN DAVIS, RICHARD OTHO PIPER, JACK KILRAIN, a/k/a Jack Hickey and John Hickey,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Georgia

Before AINSWORTH, SIMPSON and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 30, 1978

ISSUED AS MANDATE

United States Court of Appeals

FIFTH CIRCUIT

TEL 504-589-6514
EDWARD W. WADSWORTH OFFICE OF THE CLERK 600 CAMP STREET
CLERK NEW ORLEANS, LA. 70150

February 24, 1978

TO ALL PARTIES LISTED BELOW:

No. 76-3947 - U.S.A. v. JOSEPH EDWARD KILRAIN, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition(s) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By s/ Brenda M. Hanck
Deputy Clerk

**on behalf of the appellants.

bmh

cc: Mr. Ray Sandstrom
Mr. Robert H. McKnight, Jr.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U S COURT OF APPEALS
FILED
FEB 28 1978
EDWARD W WADSWORTH
CLERK

NO. 76-3947

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH EDWARD KILRAIN, a/k/a Duffy, JO ANN DAVIS, RICHARD OTHO PIPER, JACK KILRAIN, a/k/a Jack Hickey and John Hickey,

Defendants-Appellants

- - - - - - - -

Appeals from the United States District Court for the Northern District of Georgia

- - - - - - - - -

ORDER:

(X) The motion of APPELLANTS for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including March 26, 1978 the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

s/ Robert A. Ainsworth, Jr.

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT

FORT THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

FILED IN OPEN COURT
9-18-75
BEN H. CARTER, Clerk
BY: /s/ JM
Deputy Clerk

UNITED STATES OF AMERICA

CRIMINAL INDICTMENT

vs

NO. CR 75-403 - A

JOSEPH EDWARD KILRAIN
A/K/A DUFFY,
JACK KILRAIN,
A/K/A JACK HICKEY,
A/K/A JOHN HICKEY,
RICHARD OTHO PIPER,
JO ANN DAVIS,
WILLIAM J. BARBER
A/K/A JACK PRUITT,
A/K/A POP,
MRS. WILLIAM J. BARBER,
A/K/A MOM,
WILLIAM A BARBER,
A/K/A BILL PRUITT
WOODROW SEIBERT,
A/K/A WOODY

THE GRAND JURY CHARGES:

COUNT ONE

That, from on or about June 1975, to on or about July 21, 1975, in the Northern District of Georgia and elsewhere, JOSEPH EDWARD KILRAIN, also known as DUFFY, JACK KILRAIN, also known as JACK HICKEY, also known as JOHN HICKEY, RICHARD OTHO PIPER, JO ANN DAVIS, WILLIAM J. BARBER, also known as JACK PRUITT, also known as POP, MRS. WILLIAM J. BARBER, also known as MOM, WILLIAM A. BARBER, also known as BILL PRUITT, and WOODROW A. SEIBERT, also known as WOODY, did

willfully and unlawfully combine, conspire, confederate and agree and have a tacit understanding with one another and with other persons whose names are to the Grand Jurors unknown, that they would commit an offense against the laws of the United States; that is, that they would unlawfully possess with the intent to distribute and distrubute marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and said conspiracy being in violation of Title 21, United States Code, Section 846.

It was the plan and purpose of the conspiracy that JOSEPH EDWARD KILRAIN, also known as DUFFY, WILLIAM J. BARBER, also known as JACK PRUITT, also known as POP, MRS. WILLIAM J. BARBER, also known as MOM, WILLIAM A. BARBER, also known as BILL PRUITT, and others, would obtain and make available for distribution marijuana, a Schedule I controlled substance.

It was further a part of the plan and conspiracy that JACK KILRAIN, also known as JACK HICKEY, also known as JOHN HICKEY, and others would transport from the San Antonio, Texas, area to Atlanta, Georgia, the aforesaid marijuana for distribution.

And it was further a part of the plan and conspiracy that JOSEPH EDWARD KILRAIN, also known as DUFFY, JO ANN DAVIS, and others, would assist in the distribution of the aforesaid marijuana.

And it was further a part of the plan and conspiracy that RICHARD OTHO PIPER and WOODROW A. SEIBERT, also known as WOODY, and others, would and did distribute the aforesaid marijuana in the Atlanta, Georgia, area.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants committed numerous acts within the Northern District of Georgia and elsewhere, including, but not limited to, the following:

1. About and during June and July, 1975, WILLIAM

J. BARBER, also known as JACK PRUITT, also known as POP, WILLIAM A. BARBER, also known as BILL PRUITT, JOSEPH EDWARD KILRAIN, also known as DUFFY, and WOODROW A. SEIBERT, also known as WOODY, assisted by JO ANN DAVIS, made numerous telephone calls to each other.

2. About and during June 1975, WILLIAM J. BARBER, also known as JACK PRUITT, also known as POP, traveled from Texas to Atlanta, Georgia, to meet with JOSEPH EDWARD KILRAIN, also known as DUFFY.

3. On or about July 8, 1975, WILLIAM J. BARBER, also known as JACK PRUITT, also known as POP, obtained citizen band radios to be used during the transportation of the aforesaid marijuana from the San Antonio, Texas, area to Atlanta, Georgia.

4. On or about July 19, 1975, JOSEPH EDWARD KILRAIN, also known as DUFFY, and JACK KILRAIN, also known as JACK HICKEY, also known as JOHN HICKEY, traveled from Atlanta, Georgia, to the ranch of WILLIAM J. BARBER, also known as JACK PRUITT, also known as POP, near Seguin, Texas.

5. On or about July 19, 1975, WILLIAM J. BARBER, also known as JACK PRUITT, also known as POP, MRS. WILLIAM J. BARBER, also known as MOM, WILLIAM A. BARBER, also known as BILL PRUITT, JOSEPH EDWARD KILRAIN, also known as DUFFY, JACK KILRAIN, also known as JACK HICKEY, also known as JOHN HICKEY, and others met at WILLIAM J. BARBER'S ranch near Seguin, Texas, to weigh and load the aforesaid marijuana into a 25 foot Cobra Motor Home which was then under the control of JOSEPH EDWARD KILRAIN.

6. On or about July 21, 1975 JACK KILRAIN, also known as JACK HICKEY, also known as JOHN HICKEY, and others, drove the aforesaid Cobra Motor Home from the Seguin, Texas, area to Atlanta, Georgia.

7. On or about July 21, 1975, RICHARD OTHO PIPER had control of the aforesaid Cobra Motor Home at the Woodlake Apartment Complex, the residence of JO ANN DAVIS.

8. On or about July 21, 1975, RICHARD OTHO PIPER, assisted by JOSEPH EDWARD KILRAIN, also known as DUFFY, WOODROW A. SEIBERT, also known as WOODY, and others did distribute the aforesaid marijuana in the Atlanta, Georgia, area.

COUNT TWO

That, on or about the 21st day of July, 1975, in the Northern District of Georgia, RICHARD OTHO PIPER, aided and abetted by JOSEPH EDWARD KILRAIN, also known as DUFFY, JO ANN DAVIS, WOODROW A. SEIBERT, also known as WOODY, and others, did knowingly, intentionally and unlawfully possess with intent to distribute approximately 110 pounds, gross weight, of marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

A True BILL

/s/ Charles R. Bryan
FOREMAN

/s/ John W. Stokes, Jr.
JOHN W. STOKES, JR.
UNITED STATES ATTORNEY

/s/ Robert H. McKnight, Jr.
ROBERT H. McKNIGHT, JR.
ASSISTANT UNITED STATES ATTORNEY

Supreme Court, U. S.
FILED
JUN 8 1978
MICHAEL RODAK, JR., CLERK

No. 77-1432

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH EDWARD KILRAIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

WILLIAM G. OTIS,
LOUIS M. FISCHER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1432

JOSEPH EDWARD KILRAIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 566 F. 2d 979.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1978 (Pet. App. A12). A petition for rehearing was denied on February 24, 1978 (Pet. App. A13), and the petition for a writ of certiorari was filed on March 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the presence at trial of a co-defendant who had cooperated briefly with the government prior to trial and who pleaded guilty after two days of trial deprived petitioners of their Sixth Amendment right to counsel.

2. Whether the prosecutor's failure to disclose in a bill of particulars every overt act later offered in evidence to prove a conspiracy denied petitioners a fair trial.

3. Whether the evidence showed multiple conspiracies.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, all petitioners were convicted of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. 846. Petitioners Piper, Davis and Joseph Kilrain were also convicted of the substantive offense, in violation of 21 U.S.C. 841(a)(1).[1] Joseph Kilrain was sentenced to consecutive five-year terms of imprisonment, to be followed by two special parole terms of five years. Jack Kilrain was sentenced to five years' imprisonment, to be followed by a five-year special parole term. Piper was sentenced to two concurrent five-year terms of imprisonment, to be followed by a five-year special parole term, and Davis was sentenced to five years' probation. The court of appeals affirmed (Pet. App. A1-A12).

1. The evidence at trial showed that the petitioners, together with co-defendants William Barber and Barber's wife and with unindicted co-conspirator William Dart, operated a marijuana distribution network in Atlanta, Georgia. From January until July 1975, the conspirators made several trips to Texas to bring marijuana to Atlanta (Tr. 123-141, 540-542, 171-181, 544-552, 562-563, 603-607, 203-211, 219).[2] In July 1975, Dart provided information about the operation to DEA agents, who obtained a search warrant and seized the marijuana (Tr. 217-218, 220, 501-505). Petitioner Piper was arrested immediately, and the arrest of the other petitioners followed.

2. Co-defendant Barber was arrested in September 1975 and shortly thereafter approached DEA Agent Balazs and offered to become an informant (Pet. App. A5; Tr. 451-452, 576). Barber informed Balazs that Joseph Kilrain would be in Texas in November to purchase marijuana, and Barber arranged for undercover DEA agents to be present (Pet. App. A5; Tr. 456-457, 459, 581-583). At the meeting, the pending case against Barber and Joseph Kilrain was discussed, and Kilrain said he wanted the DEA informant killed (Pet. App. A5).

Barber stopped cooperating with the government shortly afterwards and went to trial with his co-defendants. After the second day of trial, Barber contacted the prosecutor and agreed to plead guilty and testify for the government; in exchange, the indictment against his wife and son was dismissed (Pet. App. A5; Tr. 435-436, 538-540). Barber testified about his role in supplying and delivering marijuana to the other petitioners (Tr. 540-542, 544-553, 560-561, 597-601), but neither he nor any other witness testified as to any of the discussions at the November 1975 meeting attended by Joseph Kilrain and the undercover agents (Pet. App. A5-A6; R. 1037-1043).

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[1]Co-defendant Barber pleaded guilty during trial. At the close of the evidence, the court entered a judgment of acquittal as to co-defendant Seibert.

[2]"Tr." refers to the transcript of the trial, in four volumes, and "R." to the record on appeal.

ARGUMENT

1. Petitioners contend (Pet. 10-13) that their Sixth Amendment rights to counsel were "wrongfully compromised" (Pet. 13) when Barber testified as a government witness. The claim appears to be twofold. First, petitioners contend (Pet. 13) that Barber's presence with undercover DEA agents at the November 1975 meeting with Kilrain violated the principle that an indicted defendant "has a right to legal representation when the government interrogates him" (*ibid.*). See *Massiah* v. *United States*, 377 U.S. 201; *Brewer* v. *Williams*, 430 U.S. 387. Second, petitioners claim that Barber's presence at "strategy discussions" with petitioners' defense counsel in the two days of trial before Barber decided to plead guilty violated their right to counsel. See *Weatherford* v. *Bursey*, 429 U.S. 545, 550-559. Both contentions are insubstantial.

a. Petitioners' claim under *Massiah* and *Brewer* is without merit for, as the court of appeals found, "[t]he agents and the informant who conversed with Kilrain did not testify at the trial as to the substance of those discussions, and [petitioners] have not demonstrated that any of the prosecution's evidence was obtained as a result of the conversations with Kilrain" (Pet. App. A6). Petitioners do not dispute that finding (Pet. 13).

Massiah announced an evidentiary exclusionary rule only: a defendant's "incriminating statements, obtained by federal agents under the circumstances [there] disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial." 377 U.S. at 207 (emphasis in original). On the other hand, the Court "accept[ed] and, at least for present purposes, completely approve[d]" the proposition that investigation of the defendant could continue even after he was indicted and had obtained counsel (*id.* at 206-207).

That is all that happened here. Even assuming that the November 1975 meeting took place under circumstances which would forbid the use of petitioner Kilrain's statements against him at trial, no such use occurred here. Nor, as the court of appeals found, did petitioners demonstrate that the meeting indirectly led to evidence against the petitioners. See *Brewer*, *supra*, 430 U.S. at 406-407 n. 12. There was thus no violation of petitioners' Sixth Amendment rights as a result of the November 1975 meeting.

b. Petitioners' claim that their rights to counsel were violated when Barber, who later testified for the government, took part in defense "strategy discussions" is equally misconceived. The claim depends upon petitioners' assertion that Barber was a government informant at the time of the "strategy discussions" (Pet. 11-12). Such an assertion, however, is contrary to the evidence, which showed that "Barber had ceased operating as a government informant well before trial began" (Pet. App. A7). This refutes any claim that the government violated petitioners' Sixth Amendment rights by planting an informer in attorney-client discussions.

Petitioners' claim is invalid for another reason. In *Weatherford*, this Court rejected the conclusion, reached by the court of appeals in that case, that "if an undercover agent meets with a criminal defendant who is awaiting trial and with his attorney and if the forthcoming trial is discussed without the agent revealing his identity, a violation of the defendant's constitutional rights has occurred * * *." 429 U.S. at 550. Rather, the Court found that no Sixth Amendment violation occurs where the informant does not testify at trial as to attorney-client conversations, does not provide the prosecution with information about defense strategy or leads to evidence, and does not otherwise use his presence at such

conversations "to the substantial detriment" of the defendant. *Id.* at 554.

There is no indication that Barber's presence at meetings with petitioners and their counsel produced such results here. Petitioners acknowledge as much, for they state that when Barber approached the prosecution in mid-trial to discuss a guilty plea, "[t]here is no way of knowing just how much of the conversations with co-defendants and their counsel was touched upon * * *" (Pet. 12-13). Petitioners state only that defense strategy "had to have been discussed" between Barber and the prosecution (Pet. 12). Because the evidence on appeal must be viewed in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80, the court of appeals correctly rejected such speculation, and that conclusion does not merit further review by this Court.

Finally, even assuming that Barber did communicate something he gleaned from sitting at the defense table, petitioners have made no showing that it benefitted the prosecution or handicapped their defense. See, *e.g.*, *Klein* v. *Smith*, 559 F. 2d 189, 197 (C.A. 2); *Mastrian* v. *McManus*, 554 F. 2d 813, 821 (C.A. 8), certiorari denied, 433 U.S. 913.

2. Petitioners also argue (Pet. 6-9) that they were denied due process when the government failed to furnish them with a bill of particulars listing each overt act which was later introduced at trial in support of the conspiracy charge. The court below held that petitioners were not entitled to discover every overt act that the government intended to use in its case (Pet. App. A10). This ruling is correct and does not require further review.

It is settled that "[t]he Government need not, when charging conspiracy, set out with precision each and every act committed by the conspirators in the furtherance of

the conspiracy." *United States* v. *Cohen*, 518 F. 2d 727, 733 (C.A. 2), certiorari denied *sub nom. Duboff* v. *United States*, 423 U.S. 926; *Wong Tai* v. *United States*, 273 U.S. 77, 81; see also *United States* v. *Murray*, 527 F. 2d 401, 411 (C.A. 5). Moreover, overt acts not pleaded in the indictment may nonetheless be introduced at trial in proving a conspiracy. *United States* v. *Adamo*, 534 F. 2d 31, 38 (C.A. 3), certiorari denied *sub nom. Kearney* v. *United States*, 429 U.S. 841; *United States* v. *Perez*, 489 F. 2d 51, 70 (C.A. 5), certiorari denied, 417 U.S. 945. And while the purpose of a bill of particulars is to inform a defendant of the nature of the charges against him and to minimize surprise at trial, the bill is not to be used to "obtain a detailed disclosure of the government's evidence prior to trial." *United States* v. *Perez*, *supra*, 489 F. 2d at 71; see also *United States* v. *Armocida*, 515 F. 2d 49, 54 (C.A. 3), certiorari denied *sub nom. Gazal* v. *United States*, 423 U.S. 858. Indeed, even where the government fails to prove any overt act alleged, but proves an unalleged act as part of the proof of conspiracy, the conviction will stand. *E.g.*, *United States* v. *Adamo*, *supra*, 534 F. 2d at 38-39; *United States* v. *Fassoulis*, 445 F. 2d 13, 19 (C.A. 2), certiorari denied, 404 U.S. 858; *Brulay* v. *United States*, 383 F. 2d 345 (C.A. 9), certiorari denied, 389 U.S. 986; *United States* v. *Armone*, 363 F. 2d 385 (C.A. 2), certiorari denied, 385 U.S. 957. Finally, the prosecutor did furnish a bill of particulars listing numerous overt acts beginning in March 1975, in addition to those detailed in the indictment (R. 1019-1022).

Petitioners claim that a pre-trial order by the magistrate required the prosecution to furnish each and every overt act intended to be introduced into evidence (Pet. 6-7). However, the trial court refused to enforce this order (Tr. 118-119, 124-125, 129, 138-139, 143-144), and "[t]he

determination of whether to impose a specific sanction for violation of its own orders is * * * surely within the discretion of the ordinary court." *United States* v. *Mackey*, 551 F. 2d 967, 970 (C.A. 5). Petitioners have failed to demonstrate an abuse of the trial court's discretion.[4]

3. Petitioners contend (Pet. 9-10) that the introduction into evidence of overt acts not listed in the indictment or bill of particulars resulted in proof of multiple conspiracies. This contention is unfounded. The proof about which petitioners complain did not concern a different scheme but simply the formation of the conspiracy charged and the first acts in furtherance of it.

The conspiracy alleged in the indictment and described in the bill of particulars involved the delivery of marijuana from Texas to Atlanta, beginning at least in March 1975 and continuing through July 1975 (Pet. App. A15-A18; R. 1019-1022). The only evidence that predated this period was testimony by Dart, first about a December 1974 meeting with Piper and Joseph Kilrain when Dart was invited to join their marijuana business (Tr. 123-132) and, second, about a January 1975 transaction in which the three men acquired marijuana and arranged its delivery to Atlanta (Tr. 133-141). Rather than proving a separate conspiracy, this testimony demonstrated the background and structure of the charged conspiracy, with Joseph Kilrain at the head and the others in lesser positions. This evidence was minimal compared with the

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[4]Petitioners' claim (Pet. 7) that they were prejudiced by the statement in the bill of particulars that the conspiracy was in effect in March 1976 is without merit. This was an obvious typographical error, as recognized by the court below (Pet. App. A10), in light of other statements in the bill of particulars showing that the conspiracy existed in early 1975 (R. 1020-1021).

overwhelming proof of the operation from March to July. Finally, the trial court instructed the jury that a single conspiracy had to be proved (Tr. 778). Under these circumstances, there was no realistic possibility that the jury could have convicted petitioners for any offense other than the one charged. See, *e.g.*, *United States* v. *Butler*, 494 F. 2d 1246, 1255-1256 (C.A. 10); *United States* v. *Cruz*, 478 F. 2d 408, 413-414 (C.A. 5), certiorari denied *sub nom. Firentes* v. *United States*, 414 U.S. 910.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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